No. 6792

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ALEXANDER STUMPF, J. L. COATES, OLIE OLSON, THEODORE BRIX, ZONE KIRKORIAN, D. ARKALIAN, JAMES PROCTOR and EUGENE L. KENNEY,
Defendants.

J. L. COATES,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

REPLY BRIEF OF APPELLANT COATES

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Sufficiency of Count One of the Indictment

In his opening brief appellant takes the position that Count One of the Indictment, namely, the conspiracy count, does not state facts sufficient to constitute a violation of the law. The Government, in its reply, in order to illustrate the sufficiency of this indictment, quotes

from *Cochran* vs. *United States,* 157 *U. S.* 286, 39 Law Ed. 704, as follows:

> "The true test is not whether the indictment might possibly have been made more certain, but whether it contains every element of the offense intended to be charged and sufficiently apprizes the defendant of what he must be prepared to meet, and in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction."

It is respectfully urged that the indictment under examination does not measure up to such test. In said Count One it is charged that the defendant and others conspired to violate sections 3 and 25 of Title Two of the Prohibition Act in that they did manufacture and possess apparatus intended and designed by said defendants for the manufacture of intoxicating liquors.

The character of the *apparatus* with which they are charged to have conspired to manufacture and possess is not described, nor is the apparatus in any manner described. Therefore, that such apparatus was intended and designed for the manufacture of intoxicating liquor, becomes a mere statement of a conclusion by the pleader.

Furthermore, there is nothing in Count One to apprize the defendant of what apparatus he conspired to possess, and after the filing of that indictment the Government might have taken any position in respect to the component elements of that apparatus that it saw fit, and there is nothing now which would prevent the Government from laying another conspiracy to the same defendants and in identical language, with the expecta-

tion of using in evidence other physical things than those used in the case at bar, as designed and intended for the manufacture of liquor. The defendant could not plead former jeopardy or conviction.

It is no answer to this proposition to state that this is a case of conspiracy and hence the indictment need not be pleaded with the same degree of particularity as is required in charging a substantive offense. Machinery, property, implements, tools, material of almost any character might or might not constitute apparatus intended and designed, from the pleader's viewpoint, for the manufacture of intoxicating liquor; but the absence of any description of such apparatus, we respectfully repeat, leaves the defendant, first, wholly ignorant in point of fact of the things which he conspired to possess, and, second, leaves him open to any number of charges without the ability to plead the jeopardy of a former conviction. We believe that the necessity of pleading facts, and not conclusions taken substantially from statutory declarations, in order to state a criminal offense in an indictment, is illustrated in the case of *Aroniss* vs. *United States,* 13 Fed. 2nd, 620. The indictment there charged that the defendants "did knowingly, wilfully and unlawfully maintain a common nuisance, that is to say, at the premises known as the Bismark Cafe, situated at 25 East Hanover street, in the city of Trenton, where intoxicating liquors, namely, beer, wine and whiskey, were kept, in violation of title two of the National Prohibition Act," etc. The Court says that the statement that the defendants did unlawfully maintain a common nuisance at a named place and in violation of the National Prohibition Act did not state an offense

as maintaining a nuisance, as it did not give any indication of the circumstances that made it such, and says that the added words, "where intoxicating liquors, namely, beer, wine and whiskey, were kept," does not make the indictment sufficient.

The Government took the position that the indictment was good because it repeats the words of the statute, which provides that

> "any * * * house * * * where intoxicating liquor is manufactured, sold, kept or bartered in violation of this title, * * * is hereby declared to be a common nuisance."

But the Court held:

> "To charge that a place was a common nuisance, the pleadings must show the acts, there occurring, by which the place was used to violate the law. The mere allegation that it was a place where liquors were kept leaves the character of the place open to dispute and, therefore, to uncertainty, for, under the law, liquors may be kept lawfully and kept unlawfully. * * * One ingredient is the use to which the place charged to be a common nuisance was put; in this instance, we surmise, the keeping of the liquor for sale; but if liquor was not kept for that purpose, the place was not a common nuisance. Merely stating an offense in the words of the statute is not sufficient except where in cases 'where the words of the statute themselves * * * fully, directly and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished.' (*United States* vs. *Simmons,* 96 U. S. 360,

362, 25 L. Ed. 819; *Evans* vs. *United States,* 153 U. S. 584, 587, 38 L. Ed. 830.)

> "The statute declared on does not do this. It merely refers to a house where liquor is kept 'in violation of' one of its provisions and leaves the pleader to show the violation by stating facts which come within its terms."

The Court then points out that it is not aided by reference to the alleged common nuisance as a cafe, because the Government urged that keeping liquors in cafes is not lawful, and finally says:

> "A valid accusation of crime cannot be made by argument or by inference, but can only be made by stating facts which, without more, show the offense."

It is elementary that a defendant is presumed to be innocent and that that is the reason why an indictment must allege facts which directly brings home to him the crime with which he is charged. He is not, by law, supposed to know or held to have knowledge.

The things which the pleader may have had in mind as apparatus intended and designed by the defendant for the manufacture of liquor, yet in no sense designed to that end, are too numerous to mention. As to what they are, the indictment is silent in respect of such identification of the physical things which the defendants intended to possess as would enable the defendant to combat a future indictment by the allegations of fact in the first indictment.

As against this argument of appellant the Govern-

ment cites R. S. 1025 (title 18, sec. 556, U. S. C. A.), which provides:

> "No indictment * * * shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only which shall not tend to the prejudice of the defendant."

This appellant is not complaining that the indictment in Count One is insufficient in matter of form, but in matter of substance, in matter of failure to charge the very thing that he is said or supposed to have done or contemplated; the failure to so much as hint the nature of the thing he conspired to possess or to show its adaptability to the purpose of violating the law; and since, as the Government points out, the *Cochran* case, supra, has very recently been approved by the United States Supreme Court in the case of *Hagner* vs. *United States,* decided April 11, 1932, the statute relied upon, 1025, above quoted, is of no aid to the Government, because the rule in the *Cochran* case and the rule in the *Aroniss* case were laid down long after the enactment of that statute.

Error to Admit Statement of Olie Olson

In his opening brief appellant, at page 41, urged error in the admission in evidence of a signed statement of defendant Olie Olson, made after the termination of the conspiracy, as hearsay. The Government, in reply, would seem to take the position that the authority relied upon, namely, *People* vs. *Gonzales,* 136 Cal. 666, is no

longer the law because decided before the adoption of section 4½ of article 6 of the California Constitution, quoted in its brief, and providing generally that judgment shall not be set aside or a new trial be granted for errors in the admission of evidence unless the court is satisfied that there has been a miscarriage of justice.

Without speculating as to whether the rule of the *Gonzales* case would or would not be followed by the Supreme Court of California because of the enactment subsequent to its decision of the constitutional provision referred to, we believe that the same does not warrant the receipt in evidence of hearsay testimony; does not do away with the right of a defendant to be confronted by a witness in order that he might cross-examine him. No such right was accorded appellant so far as the testimony of Olie Olson, given in the form of a statement made after the culmination of the conspiracy, was concerned.

The Facts Are Insufficient to Warrant the Conviction of Coates

Among the assignments of error in appellant's opening brief is found, "The evidence is insufficient to support the verdict." Much of the testimony received at the trial is included in the brief, and upon that testimony appellant took the position in argument that the evidence which was received indicated the existence of at least two distinct conspiracies to which Coates was not common, namely, the Stumpf-Malter-Coates conspiracy, if any existed, and the Brix-Malter-Stumpf conspiracy, if such existed.

The Government, in its reply brief, contends that not only there were not two distinct conspiracies, but says that appellant's argument leads to an absurd conclusion, namely, that every time a new participant enters into a conspiracy such entrance terminates the conspiracy then under way and creates a new one, and that such doctrine finds no support in law.

Taking the Government's brief as a whole, it seems to view this situation from the perspective which may be thus stated: That any conviction which may be upheld should be upheld. We, however, while granting the propriety of always upholding just convictions, believe that only those convictions should be affirmed which meritoriously ought to be affirmed, and in consequence respectfully draw this court's attention to what we conceive to be a very reasonable version of the evidence received below, which indicates to us that Stumpf and Malter never intended, as the result of conspiracy or otherwise, to construct a still or to seriously possess property or apparatus designed and intended to construct a still; but, rather, that they at most assumed to possess such property with a view to obtaining money from victims. Viewed from this standpoint, the testimony of Government witnesses, and we refer particularly to that of Stumpf and Malter, shows that their design and plan was to obtain money from Brix and Coates by the operation of what appears to be a confidence game.

Malter had been a dealer for many years in grape concentrate syrups, and says on page 168 of the transcript that he "sold the same to those who would illegally extract alcohol therefrom." He was, in a sense, a con-

spirator, and the chief conspirator; he was not indicted; he called himself the brains of the enterprise, and such brains was his contribution to the conspiracy.

Stumpf, who admittedly had been convicted of two felonies against the Government, was to contribute to the Stumpf-Malter enterprise his consummate skill as a bootlegger.

In order that this combination might profit them, they looked for dupes. Brix, dupe No. 1, was a gas station filling operator and he was inveigled into the Malter-Stumpf-Brix conspiracy, which had no other object than to secure money from Brix and not to construct a still or to possess any property really intended for that purpose. He put up his hard-earned money, some seventeen hundred dollars, and when he had "run out of the deal," quoting Stumpf's testimony (Tr., p. 93), Malter and Stumpf would appear to have decided that the time was ripe for another dupe to be called upon for money.

It is not claimed that the first conspiracy agreement or effort ever resulted in anything more than the taking of Brix's money, the pretending to build a still and the delaying of proceedings until Brix became wearied, and the consequent putting of Brix upon one side that somebody else might be looked for This scheme, pure and simple, was to draw somebody into the transaction by pretending to manufacture grape concentrates or syrups, which was legal, rigging up of an improvised still, without ever intending to run it as such, and, when the unfortunate victim would want an accounting, to dismantle this stage machinery or apparatus, with the

familiar cry that the "prohibition agents are coming." That is what happened in the Brix case.

Stumpf testified several times, as appears from appellant's opening brief, as did Malter, that the Malter-Stumpf-Brix combination was conceived and terminated before the appellant Coates became the financial angel and the victim of the second or renewed effort of Stumpf and Malter to find someone from whom they might get some more money. Stumpf testified (Tr., p. 65) that he and Malter saw Coates on the street in Fresno and it looked like some new money for them. Malter suggested that they talk to Coates to get him into a deal. As to what the deal was going to be, the testimony was fragmentary, but Malter and Stumpf worked a confidence game of having Coates and Malter turn over to Stumpf, who was styled the treasurer, five hundred dollars each, and thereafter, without the knowledge of Coates, Stumpf returned the five hundred dollars to Malter. Stumpf testified Mr. Malter was to put up half the money and Mr. Coates half the money. "I knew all the time that Mr. Malter never put up any money. We were fooling Coates. Coates believed Malter was putting up 50-50 all the time." (Tr., p. 89.)

Having gotten Coates into this game, the evidence shows that the base of operations was shifted every two or three weeks on the theory that the "prohibition agents are coming."

Meanwhile the so-called still was not in operation, nor could it operate.

There came a time when Coates had put into this enterprise approximately three thousand dollars; and,

taking with him one Olson, he went out to the Foss ranch, the place described in the indictment, and Olson immediately told him that this so-called still could not run or would not run; that the sugar and water which was being masqueraded as mash was ineffectual for any purpose, and Coates, having discovered that a fraud had been perpetrated on him, became indignant and in no uncertain language declared that he had been defrauded, victimized, would not put up another cent, and threatened legal action.

At this juncture the organized forces of money-getting, Stumpf and Malter, and the Government, came in contact and moved very quickly. The so-called plant at the Foss ranch was hijacked by Stumpf (testimony of Malter, Tr., p. 170) and moved down to Malter's ranch, where, by appointment, the prohibition agent, Mr. Whitfield, was there to seize the apparatus "designed and intended" for the manufacture of intoxicating liquor containing an alcoholic content of more than one-half of one per cent by volume.

In the foregoing narrative we have failed to call the court's attention to three things:

The Government, in its anxiety to convict, offered testimony that Malter and Stumpf brought to Coates at Fresno a little mayonnaise jar or glass containing a small quantity of potent beverage, and that Coates took several drinks and said, "It's good," and asked whether he could not get five gallons of this for drinking purposes. (Tr., p. 165.) Secondly, that some time in January a sample was taken of the so-called mash or mess at the Foss ranch, which was analyzed in April and

claimed to be mash containing 3.24 per cent alcohol by volume. Since, from the testimony of the Government witnesses, it appears that such so-called mash as was on the Foss ranch was nothing but sweet water, from which no alcohol could be made, we doubt that it could be seriously contended that the contents of the mayonnaise jar given to Coates had ever gone through the still on the Foss ranch; and from the facts in the case it is safe to assume that it had not, but that it constituted just one of the means adopted by Stumpf and Malter for exciting the interest of Coates in order that he might put up some money. The third thing we failed to mention was that Malter and Stumpf, not being satisfied with having duped Brix and Coates, looked for other victims, and, in consequence, sought out somebody else, with the result that twenty-five hundred dollars was put up to buy out some supposed partner's interest in the machinery, with Malter and Coates, and the man who put it up did not know that Coates was supposed to be a co-adventurer with them, nor did Coates know that Arkalian had been taken in. (See testimony, p. 73.)

It seems plain to us that these two Government witnesses, Malter and Stumpf, merely were seeking money from a series of victims, never having any purpose or design to operate a still; but, assuming the truth of their evidence, to at best use what appeared to be a still, to play upon the cupidity of victims. The brains of the enterprise, who feared that his indignant victims would seek recourse against him for the recovery of the moneys which he had filched from them respectively, was not indicted, but he turned his victims over to the Government to save himself, and each evening received a

daily transcript of proceedings that he might familiarize himself therewith in order that his victims should be convicted of a crime which was never contemplated by him, Malter, or Stumpf.

It does not seem to us that justice has been done, but merely that Malter has victimized certain people with the aid of Stumpf; each of them has gone free, and Coates, among others, has been convicted of a crime that Malter and Stumpf never intended should culminate in anything more than a means of obtaining money.

When Malter discovered that he could get no more money, either by various statements to his victims as to the buying of stills in Los Angeles or as to the necessity of buying materials to erect stills on one or another of the ranches where the evidence shows work was done by him, he realized that the safest thing for him to do was to assume the position with Stumpf that there had been a genuine conspiracy to possess apparatus adapted to making alcohol and "turned in" his victims to the Government.

The evidence in this case shows that the parts of the alleged still had been dragged all over Fresno County and had been shown to various victims, none of whom knew that another was interested, merely to excite their cupidity and get their money; not to buy a still or stills with, but merely to profit Malter and Stumpf.

We most earnestly suggest that this version of the testimony is reasonable and consistent with the very apparent purpose which inspired Malter and Stumpf, and that when the evidence is viewed in its proper perspective it

fails of establishing a reasonable and just basis for a verdict against the appellant.

It is therefore respectfully submitted that for the reasons herein and in the opening brief of the appellant Coates urged, the judgment should be reversed.

Dated: May 16, 1932.

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